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PP

v.

MOHAMAD RASID JUSOH

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HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[CRIMINAL APPEAL NO: 41-72-2008-III]
7 APRIL 2009

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CRIMINAL PROCEDURE: Trial - Prima facie case - Whether established - Appeal against magistrate's acquittal and discharge of accused - Evidence obtained through urine test taken by police officer - Dangerous Drugs Act 1952, s. 31A - Whether complied with - Whether prosecution failed to satisfy that it was not practicable for medical officer to obtain specimen of accused within reasonable time - Whether delay would have compromised preservation of urine specimen - Whether order of acquittal and discharge should be set aside

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EVIDENCE: Admissibility - Urine specimen - Evidence obtained through urine test taken by police officer - Dangerous Drugs Act 1952, s. 31A - Whether complied with - Whether prosecution failed to satisfy that it was not practicable for medical officer to obtain specimen of accused within reasonable time - Whether delay would have compromised preservation of urine specimen - Whether there was a prima facie case - Whether order of acquittal and discharge should be set aside

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This was an appeal by the prosecution against the order of the magistrate to acquit and discharge the accused without calling for his defence at the close of the case for the prosecution. Briefly, the accused was charged with the offence of consuming and administering a dangerous drug to himself under s. 15(1)(a) of the Dangerous Drugs Act 1952. The accused was an army personnel based in the Semenggo Army Camp in Kuching. The Anti-Drug Officer of the Camp performed a random screening of all personnel who had contact with one Sjn Azimin who was found in a state of hallucination; the accused was one of them. For this purpose, police from Narcotics Unit were called to the camp. An Inspector directed the accused to provide a urine specimen whereby the accused was escorted to the toilet by a police constable for that purpose. Preliminary testing by the police revealed that it contained amphetamine and methamphetamine. The learned magistrate ruled that the prosecution failed to satisfy the court that it was not practicable for a medical officer to obtain the specimen

of the accused within a reasonable period. The fact that the urine sample was taken in the Medical Centre of the Army Camp and the fact that a government polyclinic was situated about three kilometers away were factors that he took into account in ruling that there was non-compliance with s. 31A of the Dangerous Drugs Act 1952. The magistrate then proceeded to hold that there was no *prima facie* case. The appeal of the DPP was directed against the ruling of the magistrate that the police did not comply with s. 31A when they obtained the urine specimen from the accused.

Held (setting aside the order of acquittal and discharge):

- (1) For the purpose of preservation of the evidence *ie*, a urine specimen of the accused at the point of arrest, the police required the accused to supply it immediately. The submission of the prosecution that any delay would have compromised the preservation of the urine specimen had merit. Even if the police could have brought the accused to a medical officer or a chemist but did not do so, the evidence obtained through the urine test was admissible. (para 6)
- (2) Given the fact that the police had suspected the arrested person of having already consumed a drug, it was imperative that the urine specimen be obtained immediately before all traces of the drug disappear from the body. Even if a hospital is next door to a police station, there is no reason to assume that the medical officer may be able to attend to the arrested person immediately or give direction to a subordinate to obtain a sample. In instances where the arrested person is not already in a hospital but elsewhere when the police require a urine test, it may not be practicable for a medical officer or a person acting under his direction to obtain a urine specimen within a reasonable period of time. Collecting a urine specimen did not require any medical skill at all. What was important was the proper labeling of the bottle containing the sample with the name of the arrested person and the proper testing of the sample by the government chemist. However, insofar as the quality of the evidence was concerned, there should be no distinction between a specimen collected by the police and one collected by a medical officer. In any case, the law allowed a police officer to collect a urine specimen from an arrested person *albeit* subject to the proviso that it was not practicable for a medical officer to do so. (para 7)

- A (3) There could be no question that it was highly relevant whether the urine specimen of the accused contained prohibited drugs or otherwise. There could be no unfairness to the accused as he was required by law under penalty of committing a separate offence to supply his urine specimen upon the request of the police. There should also be no reason to infer that it was unfair to the accused that the police instead of a medical officer collected his urine specimen. (para 8)
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- C (4) The learned magistrate was wrong in holding that the police did not comply with s. 31A of the Dangerous Drugs Act 1952. PW2, the police constable who supplied the bottle for the urine specimen to the accused, testified that he labeled the bottle properly in the presence of the accused. He was never challenged that he wrongly labeled the said bottle with the name of the accused. In conclusion, on the strength of the presumptive evidence afforded by the detection of methamphetamine in the urine of the accused and the fact that the prosecution had led evidence to prove that there was no break in the chain of evidence, the magistrate should have ruled that there was a *prima facie* case to answer. The order of acquittal and discharge made by the magistrate was set aside and in its place was substituted an order for the accused to be called to enter his defence upon the said charge. (para 9)
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Case(s) referred to:

Ad Apatira v. PP & Another Appeal [1997] 3 MLJ 644 (*refd*)

Kuruma v. R [1955] AC 197 (*refd*)

PP v. Kenny Bakar (Kuching Criminal Appeal No: CRA 41-01-2007 (SG) (Unreported) (*dist*))

Saminathan v. PP [1937] MLJ 39 (*refd*)

Legislation referred to:

Criminal Procedure Code, s. 399

Dangerous Drugs Act 1952, ss. 15(1)(a), 31A(1), (2), 37(k)

For the appellant - Musli Ab Hamid DPP; AG's Chambers

For the respondent - Abdul Rahman Hj Mohamad Hazmi; M/s Tajang & Associates Advocates

Reported by Suhainah Wahiduddin

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JUDGMENT**Ravinthran Paramaguru JC:**

[1] This is an appeal by the prosecution against the order of the magistrate to acquit and discharge the accused without calling for his defence at the close of the case for the prosecution. The only ground given by the learned magistrate in his judgment is that the prosecution did not comply with s. 31A of the Dangerous Drugs Act 1952.

Brief Facts Of The Case For The Prosecution

[2] The accused was charged with the offence of consuming and administering a dangerous drug to himself under s. 15(1)(a) of the Dangerous Drugs Act 1952. The accused who was represented by counsel pleaded not guilty. At the conclusion of the case for the prosecution, the learned magistrate ruled that the prosecution failed to establish a *prima facie* case. The evidence led by the prosecution can be briefly stated as follows: The accused is an army personnel based in the Semenggo Army Camp in Kuching. On 11 October 2006, one Sjn Azimin was found in the drug store of the Army Medical Centre in a state of hallucination. The Anti-drug Officer of the Camp decided to perform random screening of all personnel who had contact with Sjn Azimin. The accused was one of them. For this purpose, police from the Narcotics Unit were called to the camp. The head of the police team, one Inspector Muning requested the accused to give his urine specimen. Preliminary testing by the police revealed that it contained amphetamine and methamphetamine. The bottle containing the urine specimen was labelled with the name of the accused and sent to the government chemist. The chemist in his report under s. 399 of the Criminal Procedure Code stated that the said sample contained methamphetamine. The accused waived his right to call the chemist for cross-examination on the chemist report.

Judgment Of Learned Magistrate

[3] The learned magistrate held that there was no direct evidence that the accused had consumed or administered the said drug to himself. The prosecution did not call eye-witnesses who could testify that the accused consumed drugs. However, the learned magistrate was urged by the prosecution to consider the presumptive evidence afforded by s. 37(k) of the Dangerous Drugs Act 1952. It reads as follows:

A 37. Presumptions.

In all proceedings under this Act or any regulation made thereunder:

- B** (k) if a person is charged for an offence of consuming a dangerous drug or administering a dangerous drug to himself or suffering any other person to administer a dangerous drug to him, and any dangerous drug is found in the urine of the person charged as a result of a urine test conducted under section 31A, the person shall be presumed, until the contrary is proved, to have consumed the drug or to have administered the drug to himself or to have suffered any other person to administer the drug to him in contravention of this Act or its regulations.
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D [4] The learned magistrate however rejected the presumptive evidence afforded by the above provision that the accused was deemed to have consumed drugs because he accepted the argument canvassed by the defence that the urine test was not conducted in accordance with s. 31A which reads as follows:

E 31A. Examination of arrested person by a medical officer.

- (1) When any person is arrested on a charge of committing an offence against this Act:

(a) which is of such a nature; or

- F** (b) which is alleged to have been committed under such circumstances,

G as give reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence against this Act, it shall be lawful for a medical officer acting at the request of any police officer not below the rank of Sergeant, or any other officer in charge of a police station, or any officer of customs, and for any person acting in aid of a medical officer and under his direction, to make such an examination or examinations of the person arrested as may be reasonably necessary in order to ascertain the facts which may afford such evidence, and to use or cause to be used such force as may be reasonably necessary for that purpose.

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- I** (1A) For the purpose of preservation of evidence, it shall be lawful for a police officer not below the rank of sergeant or an officer of customs to require an arrested person to provide a specimen of his urine for the purposes of an examination under subsection (1) if it is not practicable for

the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period.

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(1B) Any person who, without reasonable excuse, fails to provide a specimen of his urine as may be required under subsection (1) or (1A) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding four years or to both.

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(2) For the purposes of this section “medical officer” includes any person employed by the Government or a statutory authority as a medical officer or as a chemist.

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[5] In the instant case, an Inspector directed the accused to provide a urine specimen. He was escorted to the toilet by a police constable for that purpose. The learned magistrate ruled that the prosecution failed to satisfy the court that it was not practicable for a medical officer to obtain the specimen of the accused within a reasonable period. The fact that the urine sample was taken in the Medical Centre of the Army Camp and the fact that a government polyclinic was situated about three kilometres away were factors that he took into account in ruling that there was non-compliance with s. 31A. He then proceeded to hold that there was no *prima facie* case. The appeal of the learned DPP is directed against the ruling of the learned magistrate that the police did not comply with s. 31A when they obtained the urine specimen from the accused.

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Whether It Was Impracticable For A Medical Officer To Take The Urine Sample?

[6] The learned DPP submitted that the answer to the above question is in the affirmative because no medical officer was present at the Medical Centre in the Army Camp. The only staff present at that time in the Medical Centre was a medical assistant. He correctly submitted that only a police officer not below the rank of sergeant, a medical officer or a chemist could require an arrested person to give a urine specimen. In the instant case, the nearest clinic was three kilometres away from the Army Camp. Therefore for the purpose of preservation of the evidence, ie, a urine specimen of the accused at the point of arrest, the police required the accused to supply it immediately. Although, the defence did not cite any case authority for the proposition that the prosecution must prove that it was not practicable for a

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- A medical officer to obtain the urine specimen from an arrested person, learned DPP referred the court to the unreported High Court decision in *PP v. Kenny Bakar* (Kuching Criminal Appeal No: CRA 41-01-2007 (SG)). In that case, the urine specimen was obtained by the police although the Sri Aman General Hospital was 150 metres from the Police Station. The police officer in charge of the Narcotics Unit conceded that it was practicable to bring the accused to the hospital but he did not give any explanation why he did not do so. The court in the above mentioned case held that since there was an admission that it was practicable for a medical officer to obtain the urine specimen from the accused, the evidence was unlawfully obtained or obtained in breach of an express statutory provision and was therefore inadmissible in evidence. Learned DPP told the court that the decision in the above case was reversed by the Court of Appeal (Appeal No. Q-09-47-2007) but he was unable to produce the written judgment or the court order. Be that as it may, the instant case is distinguishable as the nearest polyclinic was three kilometers away and the police witnesses never conceded during the trial that it was practicable to bring the accused to a medical officer. The submission of the prosecution that any delay would have compromised the preservation of the urine specimen has merit. In any event, I am of the opinion that even if the police could have brought the accused to a medical officer or a chemist but did not do so, the evidence obtained through the urine test is admissible. Therefore, with great respect, I shall decline to follow the above mentioned unreported decision.

- [7] Section 31A was inserted into the Dangerous Drugs Act 1952 in 1983 *vide* Act A553. Subsection (1) is undoubtedly the core provision of s. 31A. It provides for the examination of an arrested person by a medical officer at the request of the police. Nowhere in sub-s. (1) is there a reference to an accused person being required to give a urine specimen to a medical officer. Indeed it would be superfluous to make such a provision as it is implicit that in a proper medical examination, the arrested person would be required to give blood or urine samples. In some cases, where an accused person is suspected of concealing drugs in his stomach, the medical officer may even perform an intrusive examination under this section (see *Ad Apatira v. Public Prosecutor And Another Appeal* [1997] 3 MLJ 644). Subsection 1A of s. 31A was only added in 2002 *vide* Act 1167. It does not purport to vest in the police officer the power to conduct a full medical examination on an arrested person. The provision gives a very

limited power to the police officer to facilitate a medical examination, ie, to obtain a urine specimen from an arrested person. That power is subject to a condition. The police officer may exercise this power only if it is not practicable for a medical officer or a person acting under his direction to obtain the urine specimen from an arrested person within a reasonable period. Therefore the question that arises is what circumstances are “not practicable” and what period is “not reasonable” that would allow the police to invoke this subsection in obtaining the urine specimen themselves. In construing what circumstances are “not practicable”, the distance from a hospital or the availability of a doctor is not the only factor that must be considered. In most cases of this nature where the charge is one of consuming or administering drugs to oneself, the police investigation is only limited to obtaining a urine test result. Given the fact that the police had suspected the arrested person of having already consumed a drug, it is imperative that the urine specimen be obtained immediately before all traces of the drug disappear from the body. Even if a hospital is next door to the police station, there is no reason to assume that the medical officer may be able to attend to the arrested person immediately or give direction to a subordinate to obtain a sample. Any delay may affect the preservation of evidence which sub-s. 1A is designed to prevent. In a situation where a medical officer is already performing an examination on an arrested person which need not necessarily be limited to a urine test as explained earlier, there is probably no reason why a police officer must request the arrested person to give a urine sample. However, in all other cases, a medical officer may not be present, for example in a raid on a pub. In the instant case, the police took the sample in a Medical Centre of the army camp but there was no army doctor available that time. Therefore in instances where the arrested person is not already in a hospital but elsewhere when the police require a urine test, it may not be practicable for a medical officer or a person acting under his direction to obtain a urine specimen within a reasonable period of time. It is also a significant point to note that collecting a urine specimen does not require any medical skill at all. What is important is the proper labelling of the bottle containing the sample with the name of the arrested person and the proper testing of the sample by a government chemist. However, insofar as the quality of the evidence is concerned, there should be no distinction between a specimen collected by the police and one

- A collected by a medical officer. In any case, the law allows a police officer to collect a urine specimen from an arrested person albeit subject to the proviso that it was not practicable for a medical officer to do so.
- B [8] My other reason is as follows. Assuming, for the sake of argument, the police breached the proviso to sub-s. 1A in obtaining the urine specimen from an arrested person, the evidence procured thereby will be considered as improperly or illegally obtained evidence. However it is settled law that in our system of justice, illegally or improperly obtained evidence is admissible provided it is relevant (see *Kuruma v. R* [1955] AC 197 and *Saminathan v. Public Prosecutor* [1937] MLJ 39). Having regard to the charge in the instant case, there can be no question that it is highly relevant whether the urine specimen of the accused contains prohibited drugs or otherwise. There can be no unfairness to the accused as he is required by law under penalty of committing a separate offence to supply his urine specimen upon the request of the police. There should also be no reason to infer that it was unfair to the accused that the police instead of a medical officer collected his urine specimen. If such an argument is countenanced, one should also accept the peculiar conclusion that, in a case where the place of arrest or the police station is fifty kilometres away from a hospital, the collection of the urine sample by the police was fair whereas in another case where the hospital was five kilometres away, it was unfair.
- E [9] I am therefore of the opinion that the learned magistrate was wrong in holding that the police did not comply with s. 31A of the Dangerous Drugs Act 1952. That was his only ground for not calling for the defence of the accused. In this appeal before me, learned counsel for defendant has not canvassed any other ground either why defence should not have been called. In the lower court, learned defence counsel argued that there could have been a mix-up of the urine samples because the preliminary testing by the police revealed two types of drugs in the urine, amphetamine and methamphetamine but the government chemist only detected methamphetamine. The learned magistrate did not address this point in his judgment. However there is no merit in the submission of counsel for defendant that the police constable who collected the urine sample could have written the name of the accused wrongly on the bottle. In my opinion the suggestion that there was a mix-up of the bottles is pure speculation. PW2, the police constable who supplied the bottle for the urine specimen to the

accused testified that he labelled the bottle properly in the presence of the accused. He was never challenged that he wrongly labelled the said bottle with the name of the accused.

[10] In conclusion, on the strength of the presumptive evidence afforded by the detection of methamphetamine in the urine of the accused and the fact that the prosecution had led evidence to prove that there was no break in the chain of evidence, the learned magistrate should have ruled that there was a *prima facie* case to answer. In the premises, I shall set aside the order of acquittal and discharge made by the learned magistrate and in its place shall substitute an order for the accused to be called to enter his defence upon the said charge.

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